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NO. 01-1572

IN THE

SUPREME COURT OF THE UNITED STATES

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES ex rel. JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF K & R LIMITED PARTNERSHIP, ANTHONY J. DUNLEAVY, AND JOHN A. KING, D.O., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT JANET CHANDLER, Ph.D.

CARL A. S. COAN, III
Counsel of Record
Coan & Lyons
1100 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 728-1070
Attorney for K&R Limited Partnership

REGINA D. POSERINA
7415 West Chester Pike
Upper Darby, PA 19082
Attorney for Anthony J. Dunleavy

MIKE BOTHWELL
G. MARK SIMPSON
Bothwell/Simpson, P.C.
304 Macy Drive
Roswell, GA 30076
(770) 643-1606
Attorneys for John A. King, D.O.

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INTERESTS OF THE *AMICI CURIAE*[1]

K & R Limited Partnership (K&R) is a Massachusetts limited partnership that is the relator in a *qui tam* action filed in the United States District Court for the District of Columbia against the Massachusetts Housing Finance Agency (MHFA), a non-State, quasi-governmental entity. This case is currently pending before the United States Court of Appeals for the District of Columbia Circuit on an interlocutory appeal by MHFA pursuant to 28 U.S.C. § 1292(b).[2]

The primary issue on MHFA's interlocutory appeal is whether a non-State governmental entity is subject to liability under the False Claims Act (FCA). Therefore, if the decision below is sustained, MHFA's interlocutory appeal will necessarily be denied.

K&R, along with all other relators, seeks to protect the public fisc by ensuring that, when non-State governmental entities misuse a portion of the billions of dollars they receive annually from the Federal Government in violation of the FCA, such entities are subject to the remedies imposed by the FCA. Accordingly, K&R has a vital interest in seeking affirmance of the decision below.

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[1]The parties have consented to the filing of this brief and the consents were filed with the Clerk of the Court contemporaneously with the filing of this brief. In accordance with Rule 37.6 of this Court, *amici curiae* K&R, Dunleavy, and King state that their counsel as specified herein authored this brief in whole and no person or entity, other than K&R, Dunleavy, and King, made a monetary contribution to the preparation or submission of the brief.

[2] The district court decision is reported at 54 F. Supp. 2d 19 (D.D.C. 2001).

Anthony J. Dunleavy is an adult individual and resident of the Commonwealth of Pennsylvania. Mr. Dunleavy is a relator in a *qui tam* action captioned *United States ex rel. Anthony J. Dunleavy v. The County of Delaware, et al.*, currently before this Honorable Court on Petition for Writ of Certiorari from the United States Court of Appeals for the Third Circuit.[3] In Mr. Dunleavy's case, the Third Circuit improperly concluded that Delaware County, a local county of the Commonwealth of Pennsylvania and a municipal corporation, was not subject to liability under the False Claims Act, without ever conducting the requisite statutory inquiry into whom Congress intended to encompass within the statutory term "person" in the Act. This Court's affirmance of the decision below would remand Mr. Dunleavy's case against Delaware County to the Third Circuit. Mr. Dunleavy's interest lies in ensuring that those who defraud the Federal Government are subject to the remedies created by Congress; and that whistleblowers are protected in their efforts to defend the Federal Fisc.

John A. King, D.O., is an adult individual and a resident of the State of Texas. Dr. King is the relator in a *qui tam* case currently pending in the United States Court of Appeals for the Eleventh Circuit, styled *United States ex rel. John A. King, D.O. v. Jackson County Hospital Corporation*[4] The district court dismissed Dr. King's complaint against Jackson County Hospital Corporation, holding that local government entities, as well as state agencies, are not "persons" subject to FCA liability. The Eleventh Circuit has stayed the appeal

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[3] The Third Circuit's Opinion is found at 279 F.3d 219 (3dCir. 2002).

[4] The district court's decision is found at 2001 U.S. Dist. LEXIS 21706 (N.D. Fla., August 17, 2001).

pending this Court's ruling in this case. An affirmance in this case would require the Eleventh Circuit to consider the hospital's alternative argument – that it is actually a "state agency" rather than a local government entity – an issue that was not expressly decided by the district court. As with the other relators, Dr. King has a direct personal interest in the resolution of this case, as well as an interest in ensuring that local government entities are held accountable for defrauding Federal taxpayers.

SUMMARY OF ARGUMENT

In 1863, Congress created the False Claims Act, and made all "persons" subject to its provisions. In 1863, the term "person" included all local governmental entities, such as municipal corporations.[5]

The lack of published opinions with local governmental entities as defendants prior to the 1986 Amendments is inconsequential, as there were few published opinions of any sort before these Amendments were enacted. Congress amended the False Claims Act in 1986 to encourage those with knowledge of fraud upon the Federal government to come forward. "Persons" liable under the FCA has always included local governmental entities.

In 1986, Congress amended the False Claims Act. These amendments strengthened the *qui tam* provisions of the Act, and changed the remedy provisions from double to treble damages. No changes were made to the term "person" in 1986. In adopting these amendments,

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[5] The terms "municipal corporations" and "local governmental entities" are used interchangeably in this brief to include all units of local government.

Congress intended all "persons," including local governmental entities, to be subject to the Act and liable for its remedy of treble damages.

The False Claims Act is the only effective means of protecting the Federal Treasury from fraud by local governmental entities. Congress determined that the False Claims Act was the preferred method for policing fraud upon the Federal Government. In 1986, Congress increased the protections offered to whistleblowers in order to encourage fraud reporting. Congress specifically created employment protections for relators, and made public sector employers liable for their actions against their employees. This action is further evidence that Congress intended local governments to be "persons" under the FCA.

Audits, Inspector General reports, and common law causes of action do not provide any incentives for whistleblowers to come forward, and provide no employment protections for relators. The only way to police fraud, and assure enforcement, is to enforce an effective False Claims Act against local governmental entities.

ARGUMENT

I. CONGRESS INTENDED THE FALSE CLAIMS ACT TO BE USED AGAINST LOCAL GOVERNMENTS, AS THE ACT IS THE ONLY EFFECTIVE MEANS AVAILABLE TO PURSUE FALSE CLAIMS AND FRAUD BY THESE ENTITIES.

A. CONGRESS INTENDED THE TERM 'PERSON' TO INCLUDE MUNICIPAL CORPORATIONS.

When Congress created the False Claims Act in 1863, it made all "persons" subject to the Act's liability provisions. In 1863, as is discussed more fully in Respondent Janet Chandler's brief, and in the brief of *amici* Taxpayers Against Fraud, Congress clearly understood municipal corporations to be "persons" subject to liability under the Act. Although the primary reason for adopting the FCA was a desire to stop massive frauds against the Union Army, the Act was broadly drafted so as to apply to all frauds against the Federal Government. *See* John T. Boese: *Civil False Claims and Qui Tam Actions*, 1-4, 1-11 (2d ed. 2002).

The argument that municipal corporations and local governmental entities must not have been persons under the FCA because there were no published opinions before the 1960s is without support. Although there were some cases under the FCA involving municipal corporations as defendants before 1986, there were no published opinions in these cases. In fact, there were few published opinions at all before 1986, because the FCA was not widely utilized before the 1986 Amendments. *See* Boese, *supra*, at 1-3; *United States ex rel. Springfield Terminal Rwy. v. Quinn*, 14 F.3d 645, 649-51 (D.C.Cir. 1994), *U.S. ex rel. LaValley v. First Nat.*

Bank of Boston, 707 F. Supp. 1351, 1354 (D. Mass. 1988).

Moreover, the 1943 amendments to the FCA led to decreased use of the FCA by providing that prior knowledge by the Government of the allegations in a complaint was an absolute bar to jurisdiction over *qui tam* suits. This Government knowledge bar made it extremely difficult to successfully prosecute an FCA action, and consequently led to decreased use of the *qui tam* provisions of the FCA. Boese, *supra*, at 1-14. Indeed, it was primarily to counter the effects of the 1943 Amendments that Congress overhauled the FCA in 1986, in an attempt to encourage the filing of *qui tam* suits. Thus, it is unsurprising that there are few reported FCA cases prior to 1986. The argument that municipal corporations are not persons under the FCA because there are no published opinions before the 1960s is misplaced.

The 1960s saw increased Federal spending on a variety of programs, much of it going to State and local governments. This spending has continued to increase in subsequent decades. *See Dixson v. United States*, 465 U.S. 482, 507 (1984) (O'Connor, J., dissenting) (noting that grants to State and local governments were $7 billion, or 7% of the budget, in 1962, and that this figure increased to $90 billion, or 10% of the budget, by 1984); *See also* Office of Management and Budget, Budget for Fiscal Year 2002, Historical Tables, Table 12.1 (projecting that grants to state and local governments will exceed 18% of total federal outlays by 2003). This increased spending expanded the pool of potential defendants under the FCA, as the Government spent its funds on a varied array of goods, services, and assistance. The expanded role of Federal funding in local governmental functions has produced an increased need for the False Claims Act. The FCA is the only

effective tool for stopping fraud upon the Federal Government by municipal corporations.

B. IN 1986, CONGRESS ALTERED THE REMEDY OF THE FALSE CLAIMS ACT WITHOUT EXCLUDING ANY CLASS OF LIABLE "PERSONS."

Both the House and Senate Reports on the bills that became the 1986 Amendments note that the purpose of the Amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. No. 99-345, at 1 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266 (hereinafter "S. Rep."); *See also* H.Rep. No. 99-660 at 16 (1986). Congress noted that, "in the face of sophisticated and widespread fraud, the (Senate) Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S.Rep. at 2, *reprinted in* 1986 U.S.C.C.A.N. 5267.

The FCA is intended to reach "all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S.Rep. at 9, *reprinted in* 1986 U.S.C.C.A.N. 5274; *See also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) ("the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government"). However, the drafters of the 1986 Amendments were aware that the Act's remedy, double damages plus a $2,000 penalty, had not been altered in 123 years. Therefore, in keeping with the need to recover the Government's losses, and to account for the effects of inflation, the House and Senate adopted treble damages plus a $5,000 to $10,000 penalty per false claim. S.Rep. at 17, *reprinted in* 1986 U.S.C.C.A.N. 5282.

In enacting the 1986 Amendments, which were designed to increase the effectiveness of the FCA, Congress manifestly did not intend to remove any class of potential defendants from the scope of the Act. Indeed, this Court acknowledged in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783 n. 12 (2000), that the term "person" "remained in the statute unchanged since 1863." All "persons" – including municipal corporations – are, therefore, now subject to the Act's treble damages remedy, including non-State governmental entities. This is consistent with this Court's finding in *Stevens* that , "the presumption with regard to corporations is just the opposite of the one governing here: they are presumptively covered by the term 'person,' see 1 U.S.C. § 1." *Stevens*, 529 U.S. at 782.

With the 1986 Amendments to the FCA, and the expanded protections for *qui tam* whistleblowers, the Government has seen an increase in the number of filed cases, and increased recoveries for the Federal Treasury. This is precisely the result intended by Congress. S.Rep. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). Clearly, Congress intended all "persons" subject to the FCA, including local governmental entities, to be liable for its remedy of treble damages.

C. THE FALSE CLAIMS ACT IS THE ONLY EFFECTIVE MEANS FOR DEALING WITH FRAUDS BY MUNICIPAL CORPORATIONS UPON THE FEDERAL GOVERNMENT.

Congress and courts have long acknowledged that the False Claims Act is the Federal Government's most effective means of policing fraud, since it provides unique incentives for enlisting the aid of whistleblowers who have knowledge of the fraud. As Congress recognized in 1986, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S.Rep. at 4, *reprinted in* 1986 U.S.C.C.A.N. 5269.

Non-State governmental entities receive billions of dollars each year from the Federal Government. For example, in its amicus brief in this case, the City of New York acknowledged that it "annually receives billions of dollars in federal funds either directly from the United States or through the State for numerous essential municipal services and programs." Brief *Amici Curiae*, City of New York, *et al.*, filed September 9, 2002, 2. In addition, the City of Milwaukee, Wisconsin, acknowledged that it received "approximately $50.6 million in federal dollars to either spend or administer primarily for Community Development Block Grants and for public health and law enforcement purposes." *Id.* at 3.

The main argument cited by these non-State governmental entities for not subjecting them to liability under the FCA is that an award of treble damages will "harm local taxpayers," "harm the beneficiaries of essential local services," and subject them to "massive punitive remedies of treble damages plus penalties." *Id.*

at 2-3. [6] However, this argument ignores the adverse effects that false claims by local governmental entities have on Federal taxpayers. In addition, adopting this argument essentially grants a license to non-State governmental entities to commit fraud against the Federal Government with impunity.

As Benjamin Franklin once stated, "[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government." James B. Helmer, Jr., False Claims Act: Whistleblower Litigation (3rd ed. 2002), p. xxi. As local governments and government-owned corporations increasingly seek to participate in the growing market for federal funds, it is to be expected that such entities will succumb to the same temptations afflicting their private counterparts. Although local government entities might be subsidized by local taxes, a dollar received from the Federal Government (and paid by taxpayers throughout the country) is a dollar that does not have to be raised through local taxation. In that the FCA is a federal statute, seeking to protect federal taxpayers, it is extremely unlikely that Congress, whether in 1863 or in 1986, would have intended to give local governments any more leeway than private corporations to defraud federal taxpayers.

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[6] Delaware County also argues in its *amicus* brief that the False Claims Act is punitive as applied to them because the Third Circuit allowed Mr. Dunleavy to proceed with his cause of action regardless of any audit resolutions with HUD. *See* Brief, at page 5. However, the language cited by Delaware County from *United States ex rel. Dunleavy v. The County of Delaware, et al.*, 123 F.3d 734 (3dCir. 1997) ("Dunleavy I"), has been essentially overruled in *Stevens*, where this Court ruled that a relator only has rights as a partial assignee of the Government, and has no standing to assert the injury in fact separate from the Government. *Stevens*, 529 U.S. at 773.

As is demonstrated by the increasing number of *qui tam* cases being filed against local governmental entities, fraud by these entities against the Federal Government is on the rise, and becoming more sophisticated. This is understandable, since local governmental entities are increasingly providing the types of services that might otherwise be provided by traditional private corporations, and are competing with such private corporations for federal tax dollars. For instance, in Dr. King's case, the defendant is a county hospital corporation authorized by state statute to provide hospital services to residents of the county. As with private hospitals, the county hospital charges for its services, and seeks reimbursement from Medicare and Medicaid for eligible patients. Except for the fact that it is created by legislative act, and is partially subsidized by local public funds, the hospital differs little from a private, non-profit corporation.

It should be noted that total federal spending on health care alone, primarily consisting of Medicare and Medicaid, amounted to $389 billion in 2000, or 21.7% of total federal outlays, and that this amount is projected to increase substantially. Office of Management and Budget, Budget for Fiscal Year 2002, Historical Tables, Table 16.1. Given that public hospitals like Jackson County Hospital Corporation compete on an even basis with private hospitals for this enormous amount of federal funds, it defies imagination to suspect that Congress intended to immunize such entities from FCA liability.

Although it is difficult to quantify the exact amount of fraud committed by local governmental entities, a brief look at many of the cases involving such entities is illustrative of the nature of the problem. In its case, K& R Limited Partnership has alleged that when MHFA, the non-State, quasi-governmental defendant entity therein, refunded older, higher-interest-rate bonds

with new, lower-interest-rate bonds in 1993, the assistance provided by HUD to MHFA pursuant to HUD's Section 236 Program should have been reduced. However, MHFA has, in violation of the FCA, continued to this day to request and receive the same amount of assistance that MHFA was receiving prior to the refunding of the aforementioned bonds at a lower interest rate. The amount of the alleged false claims in this case exceeds $20 million.

In Mr. Dunleavy's case he alleges that Delaware County failed to report to the Department of Housing and Urban Development ("HUD") its retention of HUD Community Development Block Grant funds in the amount of almost $6 million in principal and interest.[7] Instead, Delaware County routinely used this account as a slush fund, to cover general budgetary shortfalls, depleting principal and interest funds that belonged to the Federal Government. Instead of HUD funds going to assist low- and moderate-income persons with jobs or housing, they went to pay for Delaware County's salary overruns and miscellaneous overhead, an illegal use of Federal funds.

In Dr. King's case, he alleges that Jackson County Hospital Corporation wrongly billed the Government for medical costs in numerous ways. For instance, he alleges that the defendant improperly billed for items of durable medical equipment (DME) without a required

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[7]Delaware County alleges in its amicus brief that it is being unfairly punished, as it paid funds to the Federal Government in an audit, and now is still liable under the FCA. *See* Brief, at 4-6. As Delaware County is well aware, the audit resolution between the County and HUD was judicially determined by the district court not to be an "alternate remedy" under the FCA. Delaware County's argument that it will be liable for damages "calculated in the face of a credit" is illogical, as the audit resolution was judicially determined to be unrelated to the FCA action. Therefore, Delaware County's arguments are misleading and deceptive.

DME provider number; falsified time records in connection with billing for operating nurse services; submitted false billings in connection with anesthesia services; and improperly provided discounts to Medicare and Medicaid patients.

In *United States ex rel. Thomas E. Kalkhof v. County Commissioners Association of Pennsylvania, et al.*, U.S. District Court for the W.D. of PA., No. 01-93E, it is alleged that each of twenty (20) Defendant counties in Pennsylvania defrauded the Federal Government by misappropriating federal Medicaid funds intended for low-income nursing home patients. This fraud occurred when the counties claimed, through deceptive and fraudulent documentation they knew or should have know would be utilized by the State for federal submission, that they were receiving State and federal Medicaid money to be used for enhancing covered medical services for low-income persons in order to qualify for federal matching funds. In fact, these counties were not enhancing covered medical services for low-income persons with the money, and any such certifications were false. In all cases, the lion's share of the federal Medicaid funds were actually wire transferred back to the State and used for non-Medicaid allowable expenses, or uses entirely unrelated to the enhancement of Medicaid health care for which they were to be limited. Mr. Kalkhof's efforts brought about an audit by both the Office of the Inspector General and the General Accounting Office, which concluded that similar fraud schemes were occurring in fourteen other states . Congress has subsequently mandated regulatory changes through the Department of Health and Human Services' Centers for Medicare and Medicaid Services. The total amount of Medicaid money obtained by Pennsylvania and its counties alone for just the past 3 years through use of the fraudulent and deceptive claims is in excess of $ 968.6 million. This federal money was

either used for non-Medicaid health and welfare programs or remains unbudgeted for other uses.

In *United States ex rel. Hickman County, Tennessee*, currently on appeal in the Sixth Circuit (No. 01-5680), Hickman County was declared eligible for Federal Emergency Management Agency (FEMA) funds after severe flooding in 1991. In order to qualify for sufficient funds to rebuild every bridge in its county, Hickman County intentionally destroyed at least six bridges which were less than 50% damaged by flood in order to qualify to rebuild, instead of repair, all bridges in the county.

In *United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D.Cal. July 27, 2000), the relator has alleged that the City of Los Angeles misstated and overinflated costs related to highway repairs to FEMA after the Northridge earthquake. In *United States ex rel. Honeywell v. San Francisco Housing Auth, et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. July 12, 2001), Honeywell Corporation has alleged that the San Francisco Housing Authority retained savings in energy consumption from HUD, and failed to pass some of these savings through to Honeywell, as Federal regulations required.

There are more cases reported, unreported, or still under seal. But whether there are ten, or one hundred, the reality is the same: non-State governmental entities are capable of, and are in fact, perpetrating fraud upon Federal programs in increasing numbers. When Congress provides funds to local governmental entities (e.g., through block grants), or allows such entities to compete on an equal basis with private corporations for such funds (e.g., through Medicare reimbursement), it does so with the expectation that the funds provided will be used for proper purposes. The Federal funds received by such entities are not raised from the local taxpayers,

but are instead raised from taxpayers throughout the nation.

Without the FCA, there is no mechanism in place to stop this sophisticated fraud, and return stolen Federal funds to the Federal Government. Without the FCA, these non-State governmental entities are given free license to steal from the Federal Treasury.

a. No Effective Alternate Means Exist To Recoup Funds Fraudulently Obtained By Local Governments.

Nothing in the FCA suggests that Congress intended its provisions to apply only when the Government lacks alternate means to combat fraud. To the contrary, the FCA explicitly provides that "the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty," and provides that a relator retains his rights in any such proceeding. 31 U.S.C. § 3730(b)(5). Thus, it is plain that Congress intended for the FCA to be a remedy available to the Government, regardless of the availability of any other remedies. The assertions by amici that alternate remedies are available to deal with fraud by local governments is completely irrelevant to a determination of whether such entities are persons subject to FCA liability.

Moreover, alternate means for dealing with frauds against the Federal Government lack the effectiveness and protections of the FCA. For those reasons, Congress, in its wisdom, chose the FCA as its primary means of fighting fraud against the Federal Government. While Delaware County, the Petitioner, and its amici, are entitled to their opinion that alternate means exist to police fraud by local governments, that opinion is

entitled to no weight. Congress itself has declared the FCA as the preferred, and most effective, means of policing fraud by local governmental entities.

The Single Audit Act audit, mentioned by Delaware County in its brief, is an audit performed by the grantee of its use of Federal funds. *See* Brief of Delaware County, 9. As the Third Circuit noted in *Dunleavy I*, such reports or audits lack trustworthiness when

> the party accused of defrauding the federal government is in control of most of the sources of information that would effectively reveal the wrongdoing. This information dynamic was, in large part, a motivating factor behind the 1986 Amendments. Congress emphasized its belief that 'detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.' S.Rep. 99-345, 99th Cong. 2d Sess. 4, *reprinted in* 1986 U.S.C.C.A.N. 5269. Additionally, the Reporting Committee perceived the existence of 'a conspiracy of silence' to defraud the federal government. *Id.* At 6, *reprinted in* 1986 U.S.C.C.A.N. at 5271.

Id. at 745. Accordingly, audits or other reports prepared solely by the local governmental entity accused of fraud have no guarantee of accuracy or trustworthiness, and therefore cannot replace an effective False Claims Act.

Common law causes of action, such as fraud, are no substitute for an FCA claim. Among other things, the elements of the claims are different, since fraud requires a showing of intent, and an FCA claim only requires a showing of a reckless indifference. *See United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997) (noting that "reckless disregard in [the FCA] context is not a 'lesser

form of intent,' but an extreme version of ordinary negligence"). Moreover, relators have no standing to bring common law claims for fraud on behalf of the Federal Government, or against the local government, although they do have Article III standing under the FCA. The *qui tam* section of the FCA allows private attorneys general to pursue false claims even if the Government cannot adequately investigate them due to its limited resources. No common law cause of action provides this benefit.

While each Federal agency has its own Office of Inspector General, the IG alone cannot discover fraud when it is hidden by sophisticated means. None of the cases cited above was found first by an IG, although the IG may have subsequently been involved. The IG cannot detect frauds that are known to whistleblowers, without the relator's assistance and support. While IG offices play an important role in monitoring federal agencies to ensure that federal funds are spent properly, they do not have the resources needed to detect the ever increasing fraud perpetrated on the Federal Government by local governments. Without whistleblowers, as contemplated by the FCA, IG offices cannot hope to detect all the fraud committed by local governments. *See* S.Rep. at 4, *reprinted in* 1986 U.S.C.C.A.N. 5269 ("With the inception of Inspectors General, an increased number of fraud allegations are being addressed. However, available Department of Justice records show most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected.")

The Senate Report on the 1986 Amendments noted that audits alone are insufficient to weed out fraud. One relator told the Committee that "notice of an impending audit normally travels through the contractor plant 'like wildfire' and 'everyone straightens up their act'.... all departments were put on 'red alert' when auditors came through." S.Rep. at 6, *reprinted in* 1986

U.S.C.C.A.N. 5271. Without whistleblowers, IG offices cannot alone find all the fraud hidden by local governments. While IG offices play an important role in monitoring federal agencies, they cannot replace an effective False Claims Act.

b. Alternative Remedies Do Not Provide Protections to Whistleblowers

The beauty of the FCA is its ability to protect whistleblowers while encouraging them to come forward with their knowledge of frauds. Common law claims, audits, IG investigations, or other alternatives provide no protections to a whistleblower, and offer no incentives for potential whistleblowers to reveal their knowledge of fraud, which was the single most important goal of Congress in enacting the 1986 Amendments. *See* S. Rep. at 2, *reprinted in* 1986 U.S.C.C.A.N. 5267. ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."); *id.* at 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). As this Court noted, "one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting...under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n. 5 (1943).

The FCA also provides employment protection to relators:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. §3730(h). No audit, common law cause of action, or IG review provides the protections afforded a whistleblower by the FCA. These protections were enacted by Congress to encourage those with knowledge of fraud to come forward.

To receive protection under §3730(h), a plaintiff must show that there is a distinct possibility that a viable False Claims Act cause of action would be filed. *See Dookeran v. Mercy Hospital of Pittsburgh, et al.*, 281 F.3d 105, 108 (3d Cir. 2002); *accord McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000); *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 867 (4th Cir. 1999); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 741 (D.C. Cir. 1998); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir.1996); *Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). Without a viable FCA cause of action, potential whistleblowers would receive no employment protections. Without employment protections, local government employee whistleblowers will not come forward to reveal fraud. Congress created these protections to encourage fraud reporting. These protections are necessary to reveal fraud by local governmental entities.

As the Seventh Circuit noted in *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969, 975

(7thCir. 2002, the § 3730(h) protections extend to public sector employees, indicating that Congress intended public sector employers to be potential defendants under the Act:

> Unless municipalities are subject to suit under the FCA, Congress would have no reason to be concerned that municipalities might retaliate against their employees for bringing FCA claims. Given that states are excluded from the definition of 'person' within the FCA, the only public entities remaining are municipal corporations and other political subdivisions of states which are not arms or agencies of state government.

Section 3730(h) even protects employees who are investigating a potential fraud, indicating "Congress' intent to protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together." *Yesudian, supra*, at 740. The combined safeguards afforded whistleblowers under §3730(h) offer protections to local governmental employees that audits, IG reports, or common law remedies cannot provide.

Congress created the False Claims Act with a purpose "to encourage any individuals knowing of Government fraud to bring that information forward." S. Rep. at 4, *reprinted in* 1986 U.S.C.C.A.N. 5266-67. "Few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." *Hutchins v. Wilentz*, 253 F.3d 176, 186 (3dCir. 2001), citing S.Rep. No. 99-345. No alternate means exists to protect whistleblowers while pursuing fraud. Accordingly, the whistleblower protections accorded to employees of local governments by the FCA is a further indication that Congress intended that local governmental entities be subject to liability under the FCA.

CONCLUSION

Local governmental entities are increasingly perpetrating sophisticated frauds upon the Federal Government. The False Claims Act was created by Congress, and amended in 1986, to encourage those with knowledge of fraud upon the Government to come forward. Congress intended municipal corporations to be "persons" subject to the FCA and to be liable for its remedy of treble damages.

No other remedy exists to discover and prosecute fraud and false claims by local governmental entities. No other remedy offers the protections to whistleblowers contained in the False Claims Act. The False Claims Act is the only effective means of recouping funds wrongfully obtained by local governmental entities from the Federal Government.

Relators K&R Limited Partnership, Anthony J. Dunleavy, and John King, D.O., respectfully request that this Honorable Court uphold the decision of the Seventh Circuit in *Chandler*.

Respectfully submitted,

CARL A. S. COAN, III
Counsel of Record
Coan & Lyons
1100 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 728-1070
Attorney for K&R Limited Partnership

REGINA D. POSERINA
7415 West Chester Pike
Upper Darby, PA 19082
(610) 352-0760
Attorney for Anthony J. Dunleavy

MIKE BOTHWELL
G. MARK SIMPSON
Bothwell/Simpson, P.C.
304 Macy Drive
Roswell, GA 30076
(770) 643-1606
Attorneys for John A. King, D.O.

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